

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.72 OF 2004

The Commissioner of Central
Excise, Mumbai II, 9th Floor,
Piramal Chambers, Lalbaug,
'Parel, Mumbai - 400 012. .. Appellant.

V/s.

M/s.Standard Drum and
Barrel Mfg. Co.,
Corridor Road, Gavanpada,
Chembur, Mumbai 400 074 .. Respondent.

Mr.A.J.Rana, senior advocate with Mr.N.P. Sharma and
Mr.H.V. Mehta i/b. Dr.T.C. Kaushik for the
appellant.

Mr.J.J.Bhatt, senior advocate i/b. Mr.A.S. Dayal &
Associates for the respondent.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 20th DECEMBER, 2005.

ORAL JUDGEMENT (PER J.P. DEVADHAR, J.) :

1. Heard. Rule. Rule made returnable
forthwith. By consent, the appeal is taken up for
final hearing.

2. A short but interesting question of law
raised in this appeal is, where, the excise duty paid
on goods cleared on provisional assessment is
admittedly passed on to the customer, whether the
refund arising on finalisation of the provisional

assessment can be denied by applying the principles of unjust enrichment contained in Section 11B of the Central Excise Act, 1944 ? In the present case, the provisional assessment was finalised on June 8, 1999 and the respondent (hereinafter referred to as 'the assessee') made an application on November 1, 1999 claiming refund arising on finalisation of the provisional assessment. The assessing officer rejected the application by applying the principles of unjust enrichment contained in Section 11B of the Central Excise Act, 1944 (the 'Excise Act' for short). However, both the appellate authorities below, relying upon the decisions of the Apex Court in the case of Mafatlal Industries Limited V/s. Union of India reported in 1997 (89) E.L.T. 247 (S.C.) and the decision in the case of Commissioner of Central Excise V/s. T.V.S. Suzuki Limited reported in 2003 (156) E.L.T. 161 (S.C.) have held that the assessee is entitled to the refund and that the principles of unjust enrichment is not applicable to the present case. Hence, the Revenue has filed this appeal under Section 35G of the Central Excise Act, 1944.

3. The assessee is engaged in the manufacture of metal containers on job work basis on behalf of M/s.Bharat Petroleum Corporation Limited (BPCL) and

M/s.Hindustan Petroleum Corporation Limited (HPCL). During the period from July, 1991 to March, 1992, the assessee had filed price-list for metal containers at the rate of Rs.204.77 ps. per drum and cleared the same provisionally under Rule 9B of the Central Excise Rules, 1944 ('the Rules' for short) at the rate of Rs.204.77 ps. per drum.

4. On finalisation of the accounts, the assessee filed revised price lists on June 8, 1999 in respect of the goods cleared on provisional assessment by declaring the assessable value at the rate of Rs.177.61 ps. per drum and the said price-list was approved by the then Assistant Commissioner of Central Excise, Chembur Division and the assessments were finalised accordingly on June 8, 1999. As a result of the reduction in the assessable value of the drums from Rs.204.77 per drum to Rs.177.61 per drum in the final assessment order, the assessee became entitled to refund of Rs.23,98,669/- being the excess duty paid at the time of clearance of goods on provisional assessment.

5. Rule 9B(5) of the Central Excise Rules, 1944 as it stood prior to its amendment on June 25, 1999 read as follows :

"9B(5) When the duty leviable on the

goods is assessed finally in accordance with the provisions of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be".

Rule 9B was amended vide notification No.45 of 1999 dated June 25, 1999, by adding a proviso to Rule 9B(5) which reads as under :

"Provided that, if an assessee is entitled to a refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of section 11B of the Act".

6. The effect of inserting a proviso to Rule 9B(5) was that the refunds arising on finalisation of provisional assessment were subjected to the procedure prescribed under Section 11B of the Excise Act. In the present case, since refund accrued to the assessee on finalisation of the provisional assessment on June 8, 1999, that is, before insertion of the proviso to Rule 9B(5) on June 25, 1999 according to the assessee, the Revenue was obliged to refund the amount without requiring the assessee to file a refund claim as contemplated under Section 11B of the Excise Act. As the Revenue failed to comply with its statutory obligation in granting refund, the assessee by its letter dated November 1, 1999 called upon the Revenue to comply with its statutory

obligation in refunding the amount due to the assessee on finalisation of the provisional assessment.

7. On receipt of the said application, the Superintendent of Central Excise, however, issued a show cause notice on October 31, 2000 calling upon the assessee to show cause as to why the refund claim should not be rejected on the ground of unjust enrichment. The assessee objected to the denial of refund and submitted that the principles of unjust enrichment contained in section 11B of the Excise Act is not applicable in the present case. However, by an order dated August 30, 2001, the Assistant Commissioner of Central Excise held that the assessee has not disputed that the differential duty has been collected from the customer and, accordingly, rejected the assessee's refund claim by applying the principles of unjust enrichment.

8. The assessee filed an appeal against the said order dated August 30, 2001 and the Commissioner of Central Excise (Appeals), by his order dated December 31, 2001 allowed the appeal by following the judgment of the Apex Court in the case of Mafatlal Industries Limited (supra). The Appellate Authority held that the principles of unjust enrichment are not

applicable to the refunds arising on finalisation of the provisional assessment prior to June 25, 1999 and, therefore, the refund due to the assessee on finalisation of the provisional assessment on June 8, 1999 amounting to Rs.23,98,669/- cannot be denied to the assessee. On further appeal filed by the revenue, the CESTAT vide its order dated December 2, 2003 upheld the order of the Commissioner of Central Excise (Appeals). The Tribunal relying upon the decision of the Apex Court in the case of TVS Suzuki Limited (Supra) held that the amendment to Rule 9B (5) with effect from June 25, 1999 applies prospectively and not retrospectively and, therefore, refund accrued to the assessee prior to June 25, 1999 cannot be denied by applying the principles of unjust enrichment contained in Section 11B of the Excise Act.

9. The question of law framed by the Revenue in this appeal were reframed and the appeal was heard on the following reframed question of law :-

" Whether the CESTAT was justified in holding that the refund claim of the assessee could not be rejected by applying the principle of unjust enrichment, on the ground, that the principle of unjust

enrichment is not applicable to the refunds arising on the finalization of the provisional assessment under Rule 9B(5) of the Central Excise Rules, 1944 on June 8, 1999 ?

10. Mr.Rana, learned senior counsel appearing on behalf of the revenue submitted that in the present case, admittedly the assessee has passed on the burden of excise duty to its customer namely BPCL and HPCL. When the assessee made the application for refund on November 1, 1999, the amendment to Rule 9B(5) of the Excise Rules had already come into force with effect from June 25, 1999. Therefore, the refund application made by the assessee on November 1, 1999 had to be disposed of in accordance with the amended provisions of the Excise Rules. As per the amended Rule 9B(5), refunds arising on finalisation of provisional assessment have to be processed under Section 11B of the Excise Act and, therefore, the Assessing Officer was justified in applying the principles of unjust enrichment to the present case and reject the refund claim as the assessee failed to establish that the refund claimed has not been passed on to the customers.

11. Mr.Rana further submitted that the proviso

to Rule 9B(5) of the Central Excise Rules was inserted with a view to overcome the interpretation put on Rule 9B(5) by the Apex court in the case of Mafatlal Industries Limited (supra). Since, the application for refund was made by the assessee on November 1, 1999 i.e. after the amendment to Rule 9B(5), it was submitted that the principles of unjust enrichment was applicable to the refund claim made by the assessee.

12. Relying upon the decisions of the Apex Court in the case of The Nawabgunj Sugar Mills Co. Limited & Others V/s. The Union of India & Others reported in AIR 1976 SC 1152, M/s.Shiv Shankar Dal Mills etc.etc. V/s. State of Haryana & Others reported in AIR 1980 SC 1037, U.P. State Electricity Board V/s. City Board, Mussoorie & Others reported in AIR 1985 SC 883 and Full Bench decision of this Court in the case of New India Insurance Limited V.s, Union of India reported in 1990 (46) E.L.T. 23 (Bom.), Mr.Rana submitted that even if there was no statutory provision, a person can not claim or retain undue benefit and enrich himself unjustly. Relying upon the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Limited V/s. Commissioner of Central Excise & Customs reported in 2005 (181) E.L.T. 328 (SC), Mr.Rana submitted that

the principles of unjust enrichment would apply even if Section 11B of the Act is not applicable. Strong reliance was placed by Mr.Rana on Para 48 of the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Limited which reads as follows :

"48. From the above discussion, it is clear that the doctrine of unjust enrichment is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund it is necessary for the Petitioner / Appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss."

13. Mr.Rana sought to distinguish the decision of the Apex Court in the case of T.V.S. Suzuki Limited (supra), by submitting that the application for refund in the case of TVS Suzuki Ltd. was made prior to the amendment of Rule 9B(5) on June 25, 1999, whereas in the present case, the refund application was made after June 25, 1999. Accordingly, Mr.Rana submitted that the decision of the Apex Court in the case of T.V.S. Suzuki (supra) does not in any way support the case of the assessee and the Tribunal ought to have held that in the

present case, the refund claim of the assessee made on November 1, 1999 was liable to be disposed of by applying the principles of unjust enrichment. Accordingly, Mr.Rana submitted that the order passed by the Tribunal be set aside and the appeal be allowed in the light of the later judgment of the Apex Court in the case of Sahakari Khand Udyog Mandal Limited (supra).

14. Mr.Bhatt, learned senior counsel appearing on behalf of the assessee, on the other hand, submitted that the question raised in this appeal is no longer res-integra and the very same questions raised by the Revenue stands concluded in favour of the assessee by the decisions of the Apex Court in the case of Mafatlal Industries Limited (supra) and T.V.S. Suzuki (supra). Mr.Bhatt strongly relied upon para 95 and 104 of the Apex Court in the case of Mafatlal Industries Limited (supra) which reads as under :

"95. Rule 9B provides for provisional assessment in situations specified in clauses (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that "when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally

assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. However, if the final orders passed under sub-rule (5) are appealed against - or questioned in a writ petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed - then any refund claim arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B. It is also made clear that if an independent refund claim is filed after the final decision under Rule 9B(5) re-agitating the issues already decided under Rule 9B - assuming that such a refund claim lies - and is allowed, it would obviously be governed by Section 11B. It follows logically that position would be the same in the converse situation.

104. Rule 9-B provides for provisional assessment in situations specified in clause (a), (b) and (c) of sub-rule (1). The goods provisionally assessed under sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are finally assessed. Sub-rule (5) provides that 'when the duty leviable on the goods is assessed finally in accordance with the provisions of these Rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be". Any recoveries or refunds consequent upon the adjustment under sub-rule of Rule 9-B will not be governed by section 11-A or section 11-B, as case may be".

15. Mr. Bhatt strongly relied upon para 5 of the decision of the Apex Court in the case TVS Suzuki which reads as follows :

"5. Shri Verma fairly concedes that the proviso introduced in sub-rule (5) of rule 9-B cannot be said to be retrospective in operation. He, however, contends that on the date on which the proviso was brought into force i.e. 25-6-1999 the refund claim was still pending with the departmental authorities and, therefore, it had to be adjudicated in accordance with the law as it became enforceable from June 25, 1999. In our view, this contention cannot be accepted. Merely because the departmental authorities took a long time to process the application for refund, the right of the appellant does not get defeated by the subsequent amendment made in sub-rule (5) of Rule 9-B. The Commissioner of Central Excise and CEGAT were, therefore, justified in holding that the claim for refund made by the appellant had to be decided according to the law laid down by this court in Mafatlal Industries Ltd., and would not be governed by the proviso to sub-rule (5) of Rule 9-B."

(emphasis supplied)

16. In the light of the aforesaid judgments of the Apex Court, Mr. Bhatt submitted that in the present case refund accrued to the assessee on finalisation of the provisional assessment on June 8, 1999 and as per Rule 9B(5) prevailing on June 8, 1999, the Revenue was bound to grant refund due to the assessee without applying the principles of unjust enrichment contained in Section 11B of the Excise Act. This right to get refund without the application of the principles of unjust enrichment was a vested right and that vested right cannot and does not get defeated on account of the delay on the part of the Revenue in refunding the amount due to

the assessee. Therefore, whether an application for refund was made or not, the Revenue was bound to refund the amount accrued to the assessee on finalisation of the provisional assessment on June 8, 1999 without applying the principles of unjust enrichment. In support of his submission, Mr.Bhatt relied upon the decision of the Apex Court in the case of T.V.S. Suzuki Ltd. (supra) and submitted that the amendment to Rule 9B(5) is prospective and not retrospective and, therefore the principles of unjust enrichment made applicable to the refunds arising on finalisation of provisional assessment after June 25, 1999 cannot be applied to the refunds arising on finalisation of the provisional assessment prior to June 25, 1999.

17. Mr.Bhatt further relied upon the decision of the Apex Court in the case of Commissioner of Central Excise, Mumbai V/s. Allied Photographics reported in 2004 (163) E.L.T. 401 wherein the Apex Court had referred similar question to a larger Bench. The larger Bench of the Apex Court in the case of Allied Photographics India Limited reported in 2004 (166) E.L.T. 3 while holding that there is no conflict between the two decisions, namely, the decision in the case of Mafatlal Industries Limited and TVS Suzuki Limited (supra) in para 14 held as follows :

"14. Before this Court, the Department conceded rightly that in view of Para 104 of the judgment of this Court in Mafatlal Industries Ltd. (supra), bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of TVS Suzuki Ltd. (supra), therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment."

(underline supplied)

In the light of the aforesaid decision of the Apex Court, Mr.Bhatt submitted that the doctrine of unjust enrichment embodied in Section 11B of the Act was not applicable to cases where the assessment was finalised under Rule 9B(5) prior to its amendment on June 25, 1999 and, therefore, the Tribunal was justified in allowing the refund claim of the assessee.

18. As regards the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Limited (supra), Mr.Bhatt submitted that the facts in that case were totally different. The said judgment is not a case relating to the refunds arising on finalisation of the provisional assessment under Rule 9B(5) of the Excise Rules. The said judgment has not considered the judgment of the Apex Court in the case of TVS Suzuki and Allied Photographics India Limited (supra) wherein the issue relating to the refunds

arising on finalisation of the provisional assessment prior to June 25, 1999 has been considered and held that the principles of unjust enrichment contained in Section 11B of the Act are not applicable to the refunds arising on finalisation of the provisional assessment prior to June 25, 1999. Mr.Bhatt submitted that in the case of Mafatlal Industries Limited (supra), TVS Suzuki Limited (supra) and Allied Photographics India Limited (supra), the Apex Court was directly concerned with the refunds arising on finalisation of the provisional assessment under Rule 9B(5) whereas in the case of Sahakari Khand Udyog Mandal Limited (supra) the Apex Court was not at all dealing with the refunds arising on finalisation of provisional assessment. Accordingly, Mr.Bhatt submitted that the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Limited has no relevance to the facts of the present case and in the light of the decisions of the Apex Court in the case of Mafatlal Industries Limited, TVS Suzuki Ltd., and Allied Photographics India Limited referred to hereinabove, the Tribunal was justified in holding that the bar of unjust enrichment is not applicable to the refunds accrued to the assessee on finalisation of the provisional assessment on June 8, 1999.

19. Mr.Bhatt fairly stated that in the present case, the assessee had collected from its customers the excise duty paid on goods cleared on provisional assessment. However, Mr.Bhatt submitted that the assessee had subsequently refunded the said amount to its customers. Mr.Bhatt further submitted that if the contention of the Revenue that the doctrine of unjust enrichment would apply to any amount recoverable by the assessee from the department is correct, then it would render Section 11B itself otiose as the said section contemplates grant of refund under various circumstances without reference to the doctrine of unjust enrichment. He submitted that the doctrine of unjust enrichment is a doctrine of equity. Rule 9B(5) of the said Rules as it stood prior to June 25, 1999 was a specific statutory provision which obliges the adjustment of amount and consequent recovery or refund of duty pursuant to the finalisation of the provisional assessment without the application of the principles of unjust enrichment. Such a statutory provision and the right embodied therein cannot be rendered nugatory on any principles of equity. Accordingly, Mr.Bhatt submitted that the judgment in the case of Sahakari Khand Udyog Mandal Ltd., is wholly distinguishable on facts and in the light of the binding decisions of the Apex Court in the case of Mafatlal Industries

Ltd. (supra), T.V.S. Suzuki Limited (supra) and Allied Photographics India Ltd. (supra), the appeal filed by the Revenue is liable to be dismissed.

20. We have carefully considered the oral as well as the written submissions made by the counsel on both sides.

21. Law relating to refunds under the Excise Act has changed considerably with the introduction of the principles of unjust enrichment in Section 11B of the Excise Act by Act 40 of 1991. While upholding the constitutional validity of the amendment to Section 11B of the Excise Act by Act 40 of 1991, the Apex Court in the case of Mafatlal Industries Limited (supra) held that a manufacturer who has passed on the burden of duty to others has no vested right of refund. It was further held that all claims for refund of the amounts paid under the Excise Act have to be preferred and adjudicated upon under Section 11B as amended by Act 40 of 1991. As per the amended Section 11B of the Excise Act, a person claiming refund would get refund only on establishing that the the amount claimed by way of refund has not been recovered from third party. However, the Apex Court in the case of Mafatlal Industries Limited (supra) after considering the scope and ambit of Section 11B

of the Excise Act as well as Rule 9B(5) of the Central Excise Rules held that the procedure of establishing under Section 11B of the Excise Act that the burden of duty has not been passed on by the claimant was not applicable to the refunds arising on finalisation of the provisional assessment. Accordingly, it was held that, any recoveries or refunds consequent upon the adjustment under sub-rule 5 of Rule 9B will not be governed by Section 11A or Section 11B of the Excise Act, as the case may be.

22. Subsequent to the decision of the Apex Court in the case of Mafatlal Industries Limited (supra), the legislature by Act 21 of 1998, has further amended Section 11B of the Excise Act with effect from August 1, 1998 by inserting clause (eb) to Explanation B in Section 11B of the Excise Act. Relevant portion of Section 11B after insertion of clause (eb) with effect from August 1, 1998 read as follows :

"11B Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to

which such refund is claimed was collected from or paid by him and the incidence of such duty had not been passed on by him to any other person :

Provided

Provided

(2) -----

(3) -----

(4) -----

(5) -----

Explanation. - For the purposes of this section, -

(A) -----

(B) "relevant date" means, -

(a) -----

(b) -----

(c) -----

(d) -----

(e) -----

(ea) -----

(eb) in cases where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(f) -----

23. By virtue of the aforesaid amendment to Section 11B with effect from August 1, 1998, a person entitled to refund on finalisation of the provisional

assessment under the Excise Rules, is required to follow the procedure prescribed under Section 11B of the Excise Act by making an application to the concerned authority before the expiry of six months ['one year' from May 12, 2000] from the relevant date. Thus, by inserting clause (eb) to the Explanation in Section 11B of the Excise Act, the Legislature has made it clear that from August 1, 1998, the refunds required to be made by the Revenue on finalisation of the provisional assessments under the Excise Rules have to be claimed by the assessee by making an application within the time specified under Section 11B of the Excise Act. In other words, where refund accrues to the assessee on finalisation of the provisional assessment after August 1, 1998, such refund can be given to the assessee, only if the assessee claims that refund by making an application for refund within the time stipulated under Section 11B of the Excise Act and further establishes that the refund claimed therein has not been passed on to third parties.

24. It is true that while amending Section 11B with effect from August 1, 1998, similar amendments were not carried out to Rule 9B of the Excise Rules to the effect that the refunds arising on finalisation of the provisional assessment would be

governed by the provisions contained under Section 11B of the Excise Act. It is only on June 25, 1999, the Central Government in exercise of its powers conferred under Section 37 of the Excise Act, amended Rule 9B(5) by inserting a proviso to the effect that the refunds arising on finalisation of the provisional assessment shall be given only after following the procedure established under Section 11B(2) of the Excise Act. In our opinion, the amendment effected to Rule 9B(5) on June 25, 1999 is merely clarificatory in nature as it merely reiterates the existing statutory provisions contained in Section 11B of the Excise Act from August 1, 1998. The Central Excise Rules, 1944 were framed by the Central Government in exercise of the powers conferred by Sections 6, 12 and 37 of the Central Excise & Salt Act, 1944 to carry into effect the purposes of the Excise Act. Thus, the Excise Rules have to be read in the light of the Excise Act and in case of conflict between the Act and the Rules, then, the Act shall prevail. In our opinion amendment to Section 11B by Act 21 of 1998 does not create any anomaly between the Act and Rules as it merely provides that the refunds arising on finalisation of the provisional assessment must be claimed by filing an application under Section 11B within the time stipulated therein from the relevant

date. In other words, by amending Section 11B by Act 21 of 1998 it is made clear that refund arising on finalisation of the provisional assessment under Rule 9B(5) are governed by the provisions of Section 11B.

25. Although Section 11B of the Excise Act and Rule 9B of the Excise Rules operated in different fields prior to September 1, 1998, by amendment Act 21 of 1998, the legislature has removed the barriers and specifically brought the refund arising on finalisation of the provisional assessment within the purview of Section 11B and, therefore, from August 1, 1998 refund arising on finalisation of the provisional assessment has to be claimed by making an application under Section 11B of the Act within the time stipulated therein.

26. Once the refunds arising on finalisation of provisional assessment under Rule 9B(5) are brought within the purview of Section 11B of the Excise Act by Act 21 of 1998, then irrespective of similar amendments in the Excise Rules, the refunds arising on finalisation of the provisional assessment after August 1, 1998 would be governed by the provisions of the Excise Act as amended by Act 21 of 1998. If the contention of the assessee that Section 11B of the Excise Act applies to the refunds arising on

finalisation of provisional assessment only after the amendment of Rule 9B(5) on June 25, 1999 is accepted, then it would render the amendment to Section 11B by Act 21 of 1998 redundant or superfluous. When the Legislature has specifically amended Section 11B of the Excise Act with effect from August 1, 1998 thereby declaring that the refunds arising on finalisation of provisional assessment under Rule 9B(5), has to be claimed under Section 11B of the Excise Act, it will not be possible to hold that such amendment would be effective only on amendment of Rule 9B(5) from June 25, 1999. In our opinion, by amending Rule 9B(5) on June 25, 1999 the Central Government has merely reiterated the existing statutory provisions and, therefore, the amendment to Rule 9B(5) cannot be read in isolation and has to be read in consonance with the amended Section 11B.

27. Relying upon the decision of the Apex Court in the case of Mafatlal Industries Ltd. (supra), it was contended by the counsel for the assessee that the amendment to Section 11B by Act 21 of 1998 applies only to the claim of refund made in excess of what is due on finalisation of the provisional assessment. In other words, according to the counsel for the assessee, amendment to Section 11B by Act 21 of 1998 does not apply to the refund arising on

finalisation of the provisional assessment and it applies only to refunds, if any, claimed by the assessee over and above the refund arising on finalisation of the provisional assessment. To illustrate, if Rs.10/- is the refund arising on finalisation of the provisional assessment and if the assessee considers that over and above Rs.10/- the assessee is entitled to additional refund of Rs.5/- then, to claim that amount of Rs.5/- the procedure prescribed under Section 11B has to be followed as per the amendment effected by Act 21 of 1998. In our opinion, there is no merit in this contention, because, firstly, there is nothing in clause (eb) inserted by Act 21 of 1998 to suggest that the said clause shall not apply to refunds arising on finalisation of the provisional assessment. Secondly, it is now well settled by the decisions of the Apex Court in the case of Commissioner of Central Excise V/s. Flock India (P) Ltd. reported in 120 E.L.T. 285 (S.C.) and the decision of the Apex Court in the case of Priya Blue Industries Limited V/s. Commissioner of Customs reported in AIR 2004 S.C. 5115 that correctness of the assessment cannot be considered while dealing with the refund claim. In other words, if a party is aggrieved by the final assessment order passed under rule 9B(5), then the remedy is to file an appeal and it is not open to the

party to question the correctness of the order of the adjudicating authority by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing the order. Therefore, the contention of the assessee that clause (eb) inserted to the Explanation in Section 11B by Act 21 of 1998 applies to the refunds other than the refunds arising on finalisation of the provisional assessment cannot be accepted. To put it simply, Section 11B has been amended by Act 21 of 1998, with a view to bring the refunds arising on finalisation of the provisional assessments within the scope of unjust enrichment contained in section 11B.

28. Strong reliance was placed by the counsel for the assessee on the decision of the Apex Court in the case of Mafatlal Industries Limited (supra). As stated earlier, the said decision was rendered by the Apex Court prior to the amendment of Section 11B by Act 21 of 1998 and, therefore, the ratio laid down therein cannot be applied to the refunds arising on finalisation of the provisional assessment after the amendment to Section 11B with effect from August 1, 1998.

29. Even the decision of the Apex Court in the case of TVS Suzuki Limited (supra) does not support the case of the assessee. In the case of TVS Suzuki

Limited, refunds on finalisation of the provisional assessment accrued to the assessee therein in the year 1996 and the refund was claimed by making an application on July 5, 1996, that is, prior to the amendment of Section 11B on August 1, 1998. However, the said application was not disposed off. In that case, the contention of the Revenue was that during the pendency of the claim for refund dated July 5, 1996, the amendment to Rule 9B(5) had come in to force with effect from June 25, 1999 and, therefore, the pending refund application dated July 5, 1996 has to be decided as per the amended Rule 9B(5). In that context, the Apex Court in the case of TVS Suzuki Limited held that merely because the departmental authorities took a long time to process the application for refund, the right of the assessee therein does not get defeated by the subsequent amendment to Rule 9B(5). Thus, in the case of TVS Suzuki Limited (supra) refund on finalisation of the provisional assessment had accrued to the assessee therein, prior to the amendment of Section 11B on August 1, 1998, where as, in the present case, refund on finalisation of the provisional assessment accrued to the assessee after August 1, 1998. Moreover, in the case of TVS Suzuki Limited, the Apex Court was not called upon to consider the scope and effect of the amendment to Section 11B with effect from August

1, 1998, because, the issue in that case was relating to the refund arising on finalisation of the provisional assessment prior to August 1, 1998. The ratio laid down by the Apex Court in the case of TVS Suzuki Limited (supra) that the amendment to Rule 9B(5) applies prospectively from June 25, 1999 has to be read in the context of the refund arising on finalisation of the provisional assessment prior to August 1, 1998 and, therefore, the ratio laid down by the Apex Court in the case of TVS Suzuki Limited cannot be applied to the refunds arising on finalisation of the provisional assessment after August 1, 1998.

30. The decision of the Apex Court in the case of Allied Photographics India Limited (supra) does not in any way support the case of the assessee. In that case also, the issue before the Apex Court was relating to the refunds arising on finalisation of the provisional assessment prior to August 1, 1998. While bringing out the difference between 'making of refund' and 'claiming of refund' under the unamended Rule 9B(5) and the unamended Section 11B respectively, the Apex Court held that Rule 9B was a complete code by itself and that Section 11B and Rule 9B operate in different spheres. While affirming its decision in the case of TVS Suzuki Limited, the Apex

Court further held that the refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment. Since the decision in the case of Allied Photographics India Limited was rendered in the context of the refunds arising on finalisation of the provisional assessment prior to the amendment of Section 11B with effect from August 1, 1998 the ratio laid down therein would not be applicable to the facts of the present case.

31. Apart from the above, in the present case, admittedly the assessee has filed the refund application on November 1, 1999. Since amendment to Rule 9B(5) had come into force with effect from June 25, 1999, the said refund application made on November 1, 1999 had to be disposed of as per the amended Rule 9B(5) by applying the principles of unjust enrichment contained in Section 11B of the Excise Act. The contention that the refund claimed in the application dated November 1, 1999 pertains to the refund accrued to the assessee prior to June 25, 1999 and, therefore, the amended Rule 9B(5) has no application cannot be accepted for the simple reason that in view of the amendment to Section 11B with effect from August 1, 1998, all refunds arising on finalisation of the provisional assessments made under the Excise Rules are governed by the procedure

prescribed under section 11B of the Excise Act and the amendment to Rule 9B(5) on June 25, 1999 merely clarifies the legal position existing from August 1, 1998. In the present case, refund accrued to the assessee after August 1, 1998 and moreover claim for refund was admittedly made after the amendment to Rule 9B (5) and, therefore, the principles of unjust enrichment is squarely applicable to the facts of the present case.

32. Accordingly, we hold that in the facts of the present case, the Assessing Officer was justified in invoking the principles of unjust enrichment to the refund arising on finalisation of the provisional assessment on June 8, 1999 and that the refund claimed by the assessee by application dated November 1, 1999 was governed by the provisions of Section 11B of the Excise Act. In the present case, admittedly the assessee has recovered from its customers the duty paid on goods cleared on provisional assessment. Therefore, the Assessing Officer was justified in rejecting the refund claim of the assessee. Both the appellate authorities below, in our opinion, were in error in relying upon the decisions of the Apex Court which were rendered in the context of the unamended section 11B. Counsel for the assessee submitted that during the pendency of the proceedings before the

authorities below, the provisional duty collected has been refunded to the customers namely BPCL and HPCL. Admittedly, this contention was not raised before the authorities below and hence, this contention of the assessee remains unsubstantiated. Moreover, having consistently argued before the authorities below that irrespective of the assessee collecting excise duty from the customers, the revenue cannot deny refund arising on finalisation of the provisional assessment, it is not open to the assessee, at this belated stage in this appeal to make out an altogether different case that the duty collected has been refunded to the customers.

33. For all the aforesaid reasons, we hold that the assessing officer was justified in holding that the refund arising on finalisation of the provisional assessment on June 8, 1999 was governed by the principles of unjust enrichment contained in Section 11B of the Excise Act as amended by Act 21 of 1998 and the Tribunal erred in holding to the contrary. In this view of the matter, it is not necessary to go into the question as to whether the decision of the Apex Court in the case of Sahakari Khand Udyog Mandal Limited (supra) is applicable to the facts of the present case, or not.

34. In the result, the appeal succeeds. The reframed question of law set out in para 9 hereinabove, is answered in the negative i.e. in favour of the Revenue and against the assessee. In the facts and circumstances of the case, there will be no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)